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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re A.S. et al., Persons Coming  
Under the Juvenile Court Law.

B291201  
(Los Angeles County  
Super. Ct. No. DK11051A-C)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

D.S.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of  
Los Angeles County. Akemi D. Arakaki, Judge. Affirmed.

Jacques Alexander Love, under appointment by the Court  
of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

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D.S. (father) challenges the juvenile court's May 26, 2018, denial of his Welfare and Institutions Code section 388<sup>1</sup> petition requesting further family reunification services with his children, A.S. (born June 2013), G.S. (born Oct. 2014), and D.S., Jr. (born Apr. 2016). Because father did not show changed circumstances, the juvenile court rightly denied his section 388 petition. Accordingly, we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### *Section 300 Petition for A.S. and G.S.*

This family consists of the children's mother, K.P. (mother), father, and the three children.

The family had a June 3, 2013, referral to the Los Angeles County Department of Children and Family Services (DCFS) after A.S. tested positive for marijuana at the time of his birth. Mother admitted that she smoked marijuana a week prior to giving birth to address nausea. She also admitted to using marijuana during her pregnancy. The referral was substantiated, and the family agreed to participate in family preservation services.

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

A.S. had undergone a medical examination and there was a concern regarding the shape of his head. He was seen a few times at Children's Hospital, but the parents were inconsistent with physical therapy treatments. The parents took the child to UCLA and were advised to obtain a helmet for the child. They did not follow through, stating that the cost was too high.

From August 2013 through December 2014, father tested positive for marijuana nine times and failed to test 18 times. Father tested positive for hydrocodone on March 26, 2014.

During the voluntary family maintenance case for the family, mother was pregnant with G.S. and tested positive during her prenatal care. She said that she had stopped smoking marijuana about 30 days before she gave birth. When mother gave birth to G.S. in October 2014, both she and the baby tested negative. At the hospital, father smelled of alcohol.

DCFS received another referral for the family on December 11, 2014. The parents continued to use medical marijuana. Father tested positive for drugs on multiple occasions, and mother missed several drug tests. The parents were inconsistent during their drug treatment program. The parents had been inconsistent with obtaining regular care for the children. The referral was substantiated.

On December 12, 2014, the social worker went to the family home. The social worker did not observe any marijuana or drug paraphernalia in the home. The parents did not appear under the influence of drugs.

Father admitted that he continued to smoke marijuana. He had a current medical marijuana card and showed the social worker his card. Father tested positive for marijuana on December 15, 2014.

On December 17, 2014, DCFS filed a removal warrant; it was denied.

On February 6, 2015, the parents admitted that they had failed to take G.S. to the doctor for his two-month checkup and did not have a reason. Father admitted that he used marijuana the day before. He used marijuana to address injuries he sustained years ago.

The social worker reported that the parents did not appear to be under the influence of any substances and that there were no drug paraphernalia observed in the home. The house did not smell of marijuana.

Father missed his March 12, 2015, drug test. He said that he missed the test because he did not have identification.

On April 14, 2015, the social worker spoke with the children's pediatrician, Dr. Jorge A. Fuentes. Dr. Fuentes had concerns for the family. He knew the parents used marijuana and were not having the children vaccinated. The family needed guidance and parenting skills. The children were dirty, and G.S. had a rash on his neck either from sweating or from milk running down his neck. The children's health appeared fine, and the children passed their developmental screenings.

A public health nurse conducted a family visit on April 22, 2015, and found the home heavily cluttered and disorganized with clothes, toys, and household items. There were multiple safety hazards with loose wires and medication containers in reach.

A.S. had a red mark on his right side. Mother said that he ran into a gate backwards. The parents did not appear to be under the influence.

On April 29, 2015, DCFS filed a section 300 on behalf of A.S. and G.S., alleging that the parents were current abusers of marijuana and that they had medically neglected A.S.

At the detention hearing, the juvenile court found a prima facie case for detaining the children. It ordered them released to parental custody and set the matter for adjudication.

*Jurisdiction/Disposition Report (June 16, 2015)*

The dependency investigator reported that the parents had enrolled in services on January 14, 2014, at Medi-Cure Health Services Inc. (Medi-Cure). Father had seven anger management classes, five parenting classes, 21 substance abuse classes, and 25 relapse prevention classes left to complete. He tested positive for marijuana four times from January 14, 2014, through May 28, 2014.

DCFS reported that while the children were still in the parents' custody, A.S. had been discharged from physical and occupational therapy at Children's Hospital on July 2, 2014, for failing to show up after his first treatment.

Mother denied that father was a substance abuser. She explained that he was able to parent the children while he was under the influence of marijuana. He was not in favor of "government prescribed medication." She related that father had to go to the emergency room once due to an allergic reaction to Tylenol. Father had a medical marijuana card because he suffered from pain. She explained that father smoked a different form of marijuana than she did; thus, even though both mother and father smoked marijuana at the same time and the same amount, his levels were higher. She said that father missed drug tests due to a lack of transportation and confusion about how and where to test.

Father denied that he was a substance abuser. He believed that marijuana did not have any effect on his parenting. He did not want to use “government prescribed medication.” He showed the dependency investigator documents proving that he had to go to the emergency room due to his allergic reaction to Tylenol. He also showed the dependency investigator his medical marijuana card and physician’s statement and recommendation for medical marijuana. He used medical marijuana because he was burned twice on his legs when he was a child, he was in a car accident in 1981, and he had knee pain from a basketball injury. Father explained that he had used marijuana while raising his now adult children.

Regarding prescription medication, father stated that he did not like it, and he worried about the toll the medication would take on his liver and kidneys. Additionally, the medication made him drowsy. Even though Norco made him nauseous and drowsy, he continued to take four to six pills every four hours, every day. He felt like he was better able to function while using marijuana. He admitted that he did not have a prescription for hydrocodone. He said that a friend gave him hydrocodone, which is why he tested positive. He knew he would test positive for the substance.

Father acknowledged that he had positive toxicology screens and that his marijuana levels were high. He had been using marijuana for over 30 years. He insisted that none of his children had ever been neglected.

Father denied that A.S. was medically neglected. He believed that mother took the child to his medical appointments.

Marci Venigas (Venigas), the specialized foster care therapist for the family, expressed safety concerns for the family.

She visited the home on May 14, 2015. Mother told her that the parents would not stop using marijuana. She said that the home had a “faint smell” of marijuana, as if the parents had used earlier. The smell got more pronounced when she went to the refrigerator and opened it. She did not have any concerns regarding the children.

*Last Minute Information for the Court (June 16, 2015)*

The social worker reported that father missed drug tests on May 6 and June 5, 2015, and that father had tested positive for marijuana on May 29, 2015.

*Adjudication (June 16, 2015)*

Father submitted a waiver of rights form, pleading no contest. Regarding father, the juvenile court sustained count b-2, as amended, finding that father has a history of substance abuse, including hydrocodone, and is a current abuser of marijuana. Furthermore, “[t]he children are of such young age as to require constant care and supervision and the [father’s] substance abuse interferes with providing care and supervision of the children. Remedial services have failed to resolve the family problems in that the father failed to regularly participate and to complete a substance abuse rehabilitation program and parenting. The father’s substance abuse endangers the children’s physical health and safety, creates a detrimental home environment and places the children at risk of serious physical harm and damage.”

The juvenile court declared the children dependents of the court, made a home of parent order, and granted the parents family reunification services. Father’s case plan included developmentally appropriate parenting education, a full drug/alcohol program with aftercare, weekly random drug/alcohol testing, mental health counseling, individual counseling to

address case issues, transportation assistance, family preservation, and, if necessary, a psychological assessment. The matter was set for a section 364 hearing.

*Section 342 Petition for A.S. and G.S.; Detention of the Two Children*

In the December 9, 2015, detention report, the social worker reported that after the juvenile court ordered family maintenance services, the parents denied have drug problems. They stated that they did not need a drug treatment program. They also failed to consistently drug test. Father tested positive for marijuana four times from May 6, 2015, through October 9, 2015. The parents completed two parenting classes, were not enrolled in individual counseling, and were terminated from family preservation services for noncompliance. The social worker provided the parents with monthly bus passes and tokens.

On December 3, 2015, the juvenile court authorized a removal warrant, which was executed on December 4, 2015. When the social worker went to take the children into protective custody, he found A.S.'s shirt was dirty and smelled, and the child was filthy. G.S. was wearing a very dirty onesie and his diaper was soiled. He too was also very dirty. The parents only had one diaper for the children. The children's clothes that the parents packed were all dirty and smelled. The carpet and floor were dirty, and the furniture was stained, soiled, and dirty. The parents did not appear to be under the influence, and the home did not smell of marijuana.

On December 9, 2015, DCFS filed a section 342 petition on behalf of A.S. and G.S., alleging that the parents were abusing



marijuana and that they failed to regularly participate in a substance abuse rehabilitation program.

At the detention hearing, the juvenile court ordered the children detained from the parents. The juvenile court further ordered two-hour monitored visits for the parents, three times per week. The matter was set for adjudication.

*Status Review Report (Dec. 15, 2015)*

The social worker reported that while the children were in the parents' custody, they appeared happy and healthy and were developing appropriately.<sup>2</sup> The children appeared emotionally healthy and bonded to the parents. When the social worker conducted unannounced home visits, he found that the parents provided adequate supervision, were loving and affectionate, and maintained a fairly tidy home environment. They displayed appropriate parenting skills and age-appropriate discipline. The parents improved in ensuring that the children were seen by their physician.

The parents had completed two parenting classes. Father had not enrolled in a full drug treatment program with aftercare. He denied that he had a drug problem. He said that he only used medical marijuana. When asked how often he used marijuana, father replied, "The same way someone uses painkillers is the same way I use marijuana; only when I am in pain." Father said that he and mother did not smoke marijuana together and they smoked when the children were asleep. He indicated that he and mother would continue to smoke marijuana, but he believed that

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<sup>2</sup> Although unclear, it seems that the children were ordered detained in shelter care on December 9, 2015, but then placed back with the parents by the time DCFS prepared the December 15, 2015, status review report.

they were responsible when they smoked, ensuring that one parent was sober and coherent while watching the children. Regarding his missed drug tests, father stated that he had transportation issues or that he had called and did not hear his letter. When the social worker explained that a missed test was considered a positive test result, father replied that he understood.

*Jurisdiction/Disposition Report (Feb. 22, 2016)*

The social worker reported that the children had been placed in foster care with Ms. R. on December 9, 2015.

Mother denied that father had a substance abuse history. But, she admitted that father used marijuana. She noted that father failed to drug test because the family had transportation issues, and it was difficult to drug test with two young children. Father never used marijuana in the children's presence and was always sober when the children were present.

Father stated that he did not consistently drug test because he would sometimes forget to call the hotline or did not feel that he needed to test because he would test positive for marijuana. He understood that by not testing it would appear as if he was covering up his substance use. He said that since the children's detention, he had been testing consistently through DCFS and through Medi-Cure, his substance abuse program. He denied a history of substance abuse. He admitted that he used medical marijuana. He disclosed that he tried mushrooms over six years ago. He also admitted that he had been under the influence in the children's presence, but, during those times, mother was sober and taking care of the children. One of the parents was always sober, and the parents never smoked in the children's presence. The parents were unable to enroll in a substance abuse

rehabilitation program because they did not have transportation or childcare. He also believed that a substance abuse program was unnecessary because he did not have a substance abuse problem.

Father felt that mother did not have a substance abuse history. He acknowledged that she had used marijuana, but denied that she ever smoked in the children's presence. She was always sober when she took care of the children. Mother failed to drug test and participate in a substance abuse program because of transportation and childcare issues.

Father complained that termination from family preservation services was not the parents' fault. He explained that the family had transportation issues and that although family preservation provided transportation, the driver was impatient and would not wait long enough for the family to get to the van. Father took parenting education through family preservation services. He did not enroll in individual counseling because it was difficult to get into and the family had transportation issues. The parents were currently enrolled in all of the court-ordered services through Medi-Cure.

On January 26, 2016, the social worker spoke with Joni Ailey (Ailey), the Medi-Cure counselor, who confirmed that the parents were enrolled in anger management, parenting education, substance abuse, and relapse prevention. The parents were consistent with their classes and had minimal absences. Ailey had no concerns regarding the parents. She felt that they appeared to be very sincere in doing whatever was necessary to get their children back. Father tested positive for marijuana on December 30, 2015, and January 11, 2016.

*Last Minute Information for the Court (Feb. 22, 2016)*

On December 7, 2015, the parents visited the children for three hours at the DCFS office. Ms. R. stated that the parents had cancelled or missed visits on January 5, 11, and 25, and February 6, 8, 13, and 15, 2016. The parents visited eight times from December 18, 2015, through January 30, 2016.

*Adjudication Hearing (Feb. 22, 2016)*

At the adjudication hearing, the parents pled no contest, and the juvenile court sustained counts b-1 and b-2, alleging a history of substance abuse and current abuse of marijuana, of the section 342 petition.

The case was set for disposition.

*First Last Minute Information for the Court (Mar. 15, 2016)*

The parents cancelled visits with the children on February 22 and 29, and March 14, 2016. They had visited with the children five times between February 6 and March 12, 2016.

The social worker stated that the parents were consistent with their weekend visits, but inconsistent with Monday visits. The parents usually did not visit the children for the entire duration of the visits. They would end the visits about an hour early. During the visits, the parents would take turns going outside to smoke a cigarette. The children would have some sort of skin reaction after the parents smoked.

Mother was reportedly pregnant, but she denied being so. She had been dressing in overly large clothing as if trying to hide a pregnancy.

*Second Last Minute Information for the Court (Mar. 15, 2016)*

On March 14, 2016, the social worker spoke with Ailey. Ailey stated that the parents had attended six out of 16 anger management/domestic violence classes, seven out of 16 parenting

classes, 10 out of 26 substance abuse classes, two out of 26 relapse prevention classes, and 12 individual sessions. Ailey indicated that the parents appeared to be open participants during group and individual sessions. They discussed issues related to the DCFS case. They demonstrated a keen desire to complete their program and regain custody of their children. The parents appeared to be making progress towards their goals in treatment. Mother tested positive for marijuana on February 10, 2016.

*Disposition Hearing (Mar. 15, 2016)*

The juvenile court declared A.S. and G.S. dependents of the court under section 300, subdivision (b), ordered them removed from parental custody, and ordered family reunification services for the parents.

*Section 300 Petition on Behalf of D.S., Jr.; Detention of D.S., Jr.*

On April 29, 2016, DCFS received a referral of general neglect. The caller stated that mother and D.S., Jr., had tested positive for marijuana at the time of his birth. Mother denied using marijuana and claimed that she had either eaten something with marijuana in it or was around someone using marijuana. The caller also said that the parents were homeless prior to D.S., Jr.'s birth.

Mother informed the social worker that she did not know she was pregnant until the eighth month of pregnancy. She stopped smoking marijuana when she discovered she was pregnant. She did not know why her drug test was positive for marijuana. She thought that she might have been around someone smoking marijuana or that the marijuana had stayed in her system for a long time. Mother continued to participate in drug treatment at Medi-Cure. She received prenatal care from

T.H.E. Clinic. Prior to finding out that she was pregnant, mother admitted that she smoked one to two times per day and ate edible marijuana two times per day.

Father said that mother had stopped smoking marijuana; he did not know why she tested positive for marijuana. He wanted to know mother's marijuana levels. Father was informed that the parents' levels were decreasing. The parents remained in their drug treatment program. Father denied that mother had used marijuana once she discovered that she was pregnant.

The supervising social worker and public health nurse observed D.S., Jr., in the nursery. He appeared healthy. The public health nurse had no concerns regarding D.S., Jr., and he was not experiencing any withdrawals or physical symptoms.

Father failed to drug test on April 4, 2016. Mother tested positive for marijuana on March 11 and 21, 2016. She failed to drug test on April 6 and 20, 2016.

On May 4, 2016, DCFS filed a section 300 petition on behalf of D.S., Jr., alleging that he had been born with a positive toxicology for marijuana and that father failed to protect him from mother's substance abuse. At the detention hearing, the juvenile court ordered D.S., Jr., detained, and the parents were given monitored visits.

*Jurisdiction/Disposition Report (D.S., Jr.; June 27, 2016)*

D.S., Jr., was placed with Ms. R.

Mother reiterated her statements in the detention report. She said that she and father had stopped using marijuana. When the social worker asked why mother continued to test positive for marijuana, mother said that she thought it might be leftover in her system.

Father attempted to evade the social worker's questions and insisted that he had stopped smoking marijuana. When the social worker asked father why his positive toxicology screens continued to fluctuate up and down, father said that he was using an ointment with tetrahydrocannabinol (THC) for his joint pain. He believed that the THC had leaked into his blood stream during application. Father claimed that mother stopped smoking after she found out she was pregnant, but people in their apartment complex smoked marijuana and she might have inhaled some smoke. He denied seeing mother use marijuana.

Father continued to deny that he had a substance abuse problem. He said that he used medical marijuana as needed; however, he claimed that he no longer used it. He stated, "I just deal with the pain now. I [would] rather live with some pain than not have my children in my home with me."

*Adjudication (D.S., Jr.; June 27, 2016)*

The juvenile court sustained counts j-1 and j-2, alleging the parents' substance abuse, of the section 300 petition filed on D.S., Jr.'s behalf. The juvenile court ordered the parents to submit to weekly random drug testing.

*Last Minute Information for the Court (July 18, 2016)*

The parents' visits were inconsistent; they had cancelled or not shown up for several visits. Ms. R. stated that during the visits, the boys played very roughly with one another and the parents did not correct the boys' aggressive behavior. The parents seldom provided any food for the children to eat during the visits. If they did bring snacks, they would bring candy and soda. The parents failed to bring a change of clothing, diapers, or any toys.

Mother did not seem comfortable with D.S., Jr. On July 6, 2016, mother refused to hold him because she was menstruating.

Ms. R. felt that father appeared to try his best to be a father to the children, but mother seemed to have some issues regarding the children. Mother appeared cold towards D.S., Jr., and did not care to hold him, change him, or feed him.

On May 25, 2016, the parents completed their parenting class at Medi-Cure. On June 6, 2016, the parents completed their substance abuse program through Medi-Cure. Ailey confirmed that the parents had been consistent with their classes and determined to get their children back. The parents were active and participated during sessions. Father stated that he had learned how to appropriately tend to and supervise the children given their ages. He learned that nothing was more important than his children. He said that he had quit using marijuana, which the drug test results would show.

Father failed to drug test on May 4, 2016. He tested positive for marijuana on May 17 and June 30, 2016.

Meanwhile, father was living with a paternal aunt and was searching for an apartment. Mother had left the home as of June 29, 2016, and was staying with a friend. Father wanted to file for full custody of the children.

At the July 18, 2016, hearing, the juvenile court ordered DCFS to provide the parents with weekly random drug testing, to assess father's home, and to refer the parents to interactive parenting. The juvenile court granted DCFS discretion to liberalize father's visits.

*Status Review Report (Sept. 13, 2016)*

The three children were doing well in Ms. R.'s care.



Father tested positive for marijuana on June 30 and August 1, 2016. Father failed to drug test twice in July and once in August 2016. When asked why he had been inconsistent with his drug testing, father told the social worker that he would sometimes forget to go.

The social worker monitored the parents' August 26, 2016, visit. A.S. and G.S. appeared very excited to see their parents, and the parents were excited to see the children. Mother removed D.S., Jr., from the car seat and kissed and talked to him. Mother told father to order food from Burger King, and he did. Mother gave D.S., Jr., a bottle. G.S. and A.S. roamed the restaurant and interacted with guests while they ate their food. The parents observed, but allowed the children to freely walk up to strangers and run around the restaurant. The Burger King staff asked the family to leave, and mother became irritated. Father explained to mother that the staff did not want the family there because of safety issues. Father walked A.S. and G.S. outside, and they picked flowers. When they returned inside, G.S. ran around with a juice cup in his hand; he slipped and fell. G.S. cried for a while and then stopped. The social worker and the parents observed that the child was fine.

*Last Minute Information for the Court (Sept. 13, 2016)*

The social worker reported that father's home with the paternal aunt was clean, but needed to be organized.

The social worker observed father's August 27, 2016, visit with the children. Father was attentive and nurturing. He bought food for the older children, and fed, burped, and changed D.S., Jr. He sung and called out letters of the alphabet, encouraging the children to repeat after him. He rocked D.S., Jr., to sleep and played with the older children outside.

On September 12, 2016, the social worker referred the parents to the Children's Institute for an interactive parenting class. Father said that he would make the necessary contact to enroll.

*Disposition (D.S., Jr.); Six-month Review Hearing (A.S. & G.S.)*

On September 13, 2016, the juvenile court declared D.S., Jr., a dependent under section 300, subdivision (j), ordered D.S., Jr., removed from parental custody, and ordered family reunification services for the parents. The juvenile court granted father family reunification services, including a full drug/alcohol program with aftercare, random drug testing every other week, interactive parenting, individual counseling to address case issues, and monitored visitation. Mother was given unmonitored visits.

That same day, the juvenile court held the six-month review hearing for A.S. and G.S. It found that the parents had made substantial progress in their court-ordered case plan and set the matter for a 12-month review hearing.

*Status Review Report (Mar. 14, 2017)*

G.S. was enrolled in Regional Center services and making progress. D.S., Jr., was enrolled in Early Start Regional Center services and making progress.

DCFS held a Child and Family Team (CFT) meeting with the parents on February 13, 2017. The parents agreed that they needed to remain sober and provide a loving home and environment for the children. They had not yet enrolled in aftercare services and individual counseling. They agreed to enroll in individual counseling by March 1, 2017.

Mother failed to drug test eight times and tested positive for marijuana seven times from September 9, 2016, through

February 6, 2017. Father failed to drug test six times and tested positive for marijuana nine times from September 1, 2016, through February 8, 2017.

In December 2016, the family had been approved for interactive parenting. After the children's assessment, the sessions would begin on February 8, 2017. Father cancelled the February 8, 2017, appointment. Sessions occurred on February 15 and 22, 2017.

On November 22, 2016, Ms. R. reported that the parents frequently cancelled their visits, arrived late, or cut their visits short. Ms. R. assisted in monitoring and transporting the children to the parents' visits on Thursdays.

Father participated in mother's unmonitored visits. The parents visited the children in the park. Ms. R. said that during drop off and pick up, the parents were appropriate. The parents brought food to the children. Father cancelled six visits from November 26, 2016, through February 15, 2017.

*Six-month Review Hearing (D.S., Jr.); 12-month Review Hearing (A.S. & G.S.; Mar. 14, 2017)*

The juvenile court found that the parents had consistently and regularly visited the children and made significant progress in resolving the problems that led to the children's removal. The juvenile court set A.S. and G.S.'s case for a section 366.26 hearing and D.S., Jr.'s case for a 12-month review hearing.

*Status Review Report (Sept. 18, 2017)*

The social worker reported that A.S. was exhibiting aggressive behavior that concerned Ms. R. The child was receiving Regional Center services and working on his issues.

On June 15, 2017, the family had a CFT meeting. The parents agreed that they needed to remain sober. They agreed to

work on gaining outside support to maintain sobriety, such as by attending Narcotics Anonymous (NA) meetings or obtaining a sponsor.

The parents still had not enrolled in aftercare services and individual counseling. Father started attending weekly NA meetings, which he found helpful. He did not obtain a sponsor. On April 11, 2017, father began attending Just Beginning and Project Fatherhood. Father failed to drug test five times, and tested positive for marijuana 17 times from March 9 through August 15, 2017. The social worker noted that father had been letting her know when he would miss drug tests due to work or visits.

Father made consistent contact with Ms. R. several times a week to speak to the children and check in on their progress. On August 2, 2017, father completed his interactive parenting sessions. He was employed, attended weekly visits, and maintained a household. He continued to test positive for marijuana.

Ms. R. was concerned about the children's safety during their visits with the parents. During drop off and pick up, the parents were unable to handle the children. On two occasions, G.S. had almost been hit by a car because the children did not listen to the parents. The parents struggled to keep the children under control. On August 2, 2017, Ms. R. sent the social worker a picture of G.S.'s head, which had a huge red bump. Ms. R. had to ask the parents about his injury because they failed to inform her of the injury. The parents indicated that G.S. had fallen.

*Last Minute Information for the Court (Nov. 15, 2017)*

The parents had regular weekly visits with the children. Father visited the children on Wednesdays for four hours. The

parents visited together for G.S.'s birthday. Ms. R. stated that after the visits, the children would return home hungry, injured, and sometimes sick (throwing up, diarrhea, and/or dehydrated).

Father failed to drug test on October 10, 2017, and tested positive for marijuana on October 3, 16, and 26, and November 6, 2017.

On November 9, 2017, father provided the social worker with an updated medical marijuana card and informed the social worker that he had stopped smoking marijuana, but was taking cannabidiol (CBD), a marijuana derivative, to help with his chronic back and knee pain. Father said that his levels would be much lower since he was no longer smoking marijuana.

*Combined Section 366.26 Hearing (A.S. & G.S.) and 12-month Review Hearing (D.S., Jr.; Nov. 15, 2017)*

The juvenile court found that father had made substantive progress in his court-ordered case plan. But, it ordered the parents' family reunification services terminated, ordered monitored visitation for the parents, and set the matter for a section 366.26 hearing as to all three children.

*Section 366.26 Report (Mar. 14, 2018)*

The social worker reported that the children had been visiting the parents for approximately five to six hours each visit. When father had visits, he would bring the paternal aunt and the paternal aunt's daughter. Ms. R. stated that father cursed at her in January 2018 over the phone. Ms. R. asked father not to call back due to his disrespect. Father had not spoken to Ms. R. since then. Father had not visited the children since November 2017.

Ms. R. said that she would adopt the children if the parents were unable to reunify. The children had a strong bond with

Ms. R. and her family. Ms. R. provided for the children's medical, developmental, and emotional needs.

Father informed the social worker that he wanted to resume visits with the children.

*Father's Section 388 Petition*

On March 19, 2018, father filed a section 388 petition, alleging that he had obtained a proper physician's statement and recommendation for the use of medical marijuana for the treatment of his chronic back pain and incidental injuries from a car accident. Father also alleged that he completed his case plan, including a substance abuse treatment program, interactive parenting, and a parenting class. He had consistently been available for visits. He requested further family reunification services. He claimed that such services would be in the children's best interests because he was closely bonded to the children, had successful unmonitored visits since September 2016, and was attentive and loving with the children.

Attached to father's petition were certificates of completion for a substance abuse program dated June 6, 2016, a parenting program dated May 25, 2016, and an interactive parenting program dated August 2, 2017. Also attached was a physician's statement and recommendation for father for medical marijuana, with an issue date of January 9, 2018, and an expiration date of January 8, 2019. The document noted: "The patient further affirms the fact that they have been informed not to drive, operate heavy machinery or engage in any activity that requires alertness while using medical marijuana."

Father's section 388 petition was set for hearing.

*DCFS's Response to Father's Section 388 Petition*

The social worker noted that the children were very young and had developmental delays. They appeared bonded to Ms. R. and father.

On March 21, 2018, father stated that he would fight to regain custody of his children. Father asked the social worker if mother had contacted DCFS. The social worker reminded father to stay focused on what he needed to do.

DCFS recommended that the juvenile court deny father's petition. Father continued to miss drug tests and test positive for marijuana. He had completed a drug program, but did not complete an aftercare program. He never found a sponsor. Although he had a proper physician's statement, his levels of cannabis use were "extremely high."

On April 20, 2018, father informed the social worker that he had started therapy with Ness Counseling Center. He participated in two sessions, but was looking for another agency. He completed the interactive parenting program.

Regarding visitation, the social worker observed father's visit with the children at Chuck E. Cheese. Father struggled to keep the children under control. He had D.S., Jr., in a high chair and would push him around while the older two boys walked beside father. Father placed G.S. on top of the basketball shooting frame and walked away to play another game with A.S. and D.S., Jr. When father walked away, G.S. fell face first onto the ground; father came running towards G.S.

Ms. R. reported that on March 21, 2018, after a visit with the parents, A.S. referred to a Sprite can as alcohol. A.S. did not say on which visit he saw the alcohol. Ms. R. added that after father's last visit on November 22, 2017, father had called to ask

about the children, but he did not ask to visit. In December 2017, father rarely called to check on the children and did not call to wish them a Merry Christmas. Father verbally assaulted Ms. R. three times.

The supervising social worker spoke to father about visits with the children in January 2018, informing him that the visits were not terminated. Father said that he understood that he could still visit the children even though his family reunification services had been terminated. The supervising social worker also advised father's therapist on February 7, 2018, that his visits had not been terminated.

The social worker indicated that the children had special needs. G.S. had severe speech delays and fell often. A.S. and G.S. both showed signs of autism. They were not yet potty trained. A.S. often smeared his feces on the walls. G.S. would pick at his scabs and not let them heal.

*Status Review Report (May 16, 2018)*

The social worker reported that the children were doing well in Ms. R.'s home. A.S. and G.S. were scheduled for an individualized education plan (IEP) assessment.

On April 7, 2018, father resumed his visits with the children. Father said that the visit went smoothly and the children had a great time. Father visited with the children at the park. Ms. R. said that during the visitation exchange, the paternal aunt and father confronted Ms. R. about her reporting of alcohol consumption during the children's visits with the parents. Ms. R. did not feel safe interacting with father because he verbally insulted her three times over the telephone.



*Hearing on Father's Section 388 Petition (May 16, 2018)*

After admitting various documents into evidence, the juvenile court heard testimony from father.

Fifty-three-year-old father testified that he had been using marijuana since he was 20 years old. He admitted to using other drugs in his youth. He used medical marijuana for lower back pain, third degree burns on his legs, and a broken jaw, which he suffered in 1981 in a car accident. He was prescribed Motrin and Norco for his injuries, however, because those medications made him feel drowsy and groggy, he stopped taking them. He advised his doctor, who told him to use medical marijuana. Dr. Norman Johnson prescribed the medical marijuana for father. Father had seen Dr. Johnson twice, with the last time being in January 2018. His primary physician was Dr. Reed.

Father explained that he mostly smoked marijuana at night to help him relax his back and go to sleep. He did not believe that his use of marijuana affected his ability to care for his children because he only used it at night. He only used medical marijuana when he was in pain. He did not feel that marijuana prevented him from performing regular duties during the day. He acknowledged that he did not use marijuana during the day because he had "other responsibilities to take care of."

Father said that he would smoke the marijuana or use CBD oil. He believed that marijuana could be addictive if a person allowed it to be. He did not believe that he was addicted to marijuana. Instead, he was a medical marijuana user.

Regarding visitation, father claimed to have had unmonitored visits with the children twice a week prior to the termination of family reunification services. He claimed that he

would bring all necessities for the children to visits. He would change and feed the children during the visits.

Father said that he was familiar with the children's developmental issues and they were being assessed for autism. He noticed that G.S. had balance issues and would occasionally fall. Father said that he had experience with children with developmental issues because his grandson and great-nephew were autistic.

Regarding his substance abuse program, father said that he mostly learned about "harder" drugs.

Father acknowledged that he had tattoos of cannabis leaves on his left hand.

Father's counsel requested that the juvenile court grant father's section 388 petition for further family reunification services. The children's counsel argued that father had failed to demonstrate changed circumstances as father had provided prior marijuana prescriptions in the past. DCFS joined with the children's counsel's argument.

The juvenile court denied father's section 388 petition, stating: "By all accounts and even by [father's] own testimony, [father] has indicated that he doesn't believe that it would be appropriate for him to ingest or utilize the marijuana during the day because it's his own words, it wouldn't be appropriate or he has responsibilities. Being a caregiver to a child is a 24-hour job and requires him to be able to be responsible and clearheaded all the time. And so although I understand his position, it's pretty clear what the reality is." The juvenile court noted that it regularly sees individuals who use medicinal marijuana for pain management, but those persons are able to reduce their levels so that they can manage their pain and "[b]e clearheaded, not feel

that the use would hinder their ability to appropriately function. And by all accounts, [father] is of the opinion that he hasn't at this point." While father had made adjustments to his marijuana levels, he was not able to follow through with maintaining those levels.

The juvenile court then stated that it was not trying to address the legality of marijuana usage. "We're [only] talking about the abuse of it affecting [father's] ability to appropriately care for the children. And we're looking at that because we're looking at if, in fact, we have a changed circumstance now with regard to that situation. I am not here to relitigate the petition as we have all said. We're here to determine if, in fact, we have that changed circumstance."

And the juvenile court did not find a changed circumstance. Thus, it denied father's section 388 petition.

#### *Appeal*

Father timely appealed.

### **DISCUSSION**

Father contends that the juvenile court abused its discretion when it denied his section 388 petition seeking reinstatement of family reunification services.

#### *I. Applicable law and standard of review*

Section 388, subdivision (a)(1), provides, in relevant part: "Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstances or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made." (See also *In re Brandon C.* (1993) 19 Cal.App.4th 1168, 1172; Cal. Rules of Court, rule 5.570(f).) "Section 388 provides the 'escape mechanism' . . . built into the

process to allow the court to consider new information. [¶]  
. . . Even after the focus has shifted from reunification, the  
scheme provides a means for the court to address a legitimate  
change of circumstances . . . . [¶] . . . [T]he Legislature has  
provided the procedure pursuant to section 388 to accommodate  
the possibility that circumstances may change after the  
reunification period that may justify a change in a prior  
reunification order.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

That being said, “[i]t is not enough for a parent to show *just*  
a genuine change of circumstances under the statute. The parent  
must show that the undoing of the prior order would be in the  
best interests of the child.” (*In re Kimberly F.* (1997) 56  
Cal.App.4th 519, 529; § 388, subd. (b).) Some factors which  
“provide a reasoned and principled basis on which to evaluate a  
section 388 motion” include “(1) the seriousness of the problem  
which led to the dependency, and the reason for any continuation  
of that problem; (2) the strength of relative bonds between the  
dependent children to *both* parent and caretakers; and (3) the  
degree to which the problem may be easily removed or  
ameliorated, and the degree to which it actually has been.” (*In re*  
*Kimberly F., supra*, at p. 532.)

“[T]he burden of proof is on the moving party to show by a  
preponderance of the evidence that there is new evidence or that  
there are changed circumstances that make a change of  
placement in the best interests of the child.” (*In re Stephanie M.*  
(1994) 7 Cal.4th 295, 317.)

“Whether a previously made order should be modified rests  
within the dependency court’s discretion, and its determination  
will not be disturbed on appeal unless an abuse of discretion is  
clearly established.” (*In re Amber M.* (2002) 103 Cal.App.4th

681, 685; see also *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) “The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.” (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318–319.) Thus, we will not reverse a juvenile court’s denial of a section 388 petition ““unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].”” (*In re Stephanie M.*, *supra*, at p. 318.) “It is rare that the denial of a section 388 motion merits reversal as an abuse of discretion.” (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 522.)

## II. *The juvenile court did not err*

As the juvenile court aptly noted, father’s circumstances had not changed between the time the juvenile court terminated his family reunification services and his section 388 petition. Briefly said, father still has not adequately addressed his substance abuse problem.

The family came to the attention of DCFS in June 2013. Father admits that throughout these dependency proceedings, he has continued to use marijuana. At the June 16, 2015, adjudication hearing, the juvenile court ordered family maintenance services for father, including a full drug/alcohol program with aftercare, weekly random drug/alcohol testing, mental health counseling, and individual counseling to address case issues. At the March 15, 2016, disposition hearing on A.S. and G.S.’s section 342 petition, the juvenile court ordered family reunification services for the parents. At the September 13, 2016, disposition hearing for D.S., Jr., the juvenile court ordered family

reunification services for father, including a full drug/alcohol program with aftercare, random drug testing, and individual counseling to address case issues.

At the time of the hearing on father's section 388 petition, approximately five years had passed since the family came to the attention of DCFS, more than three years had passed since the filing of the section 300 petition on behalf of A.S. and G.S., and more than two years had passed since A.S. and G.S. had been detained from parental custody. However, throughout that entire time, father continued to test positive for marijuana. He failed to complete an aftercare program and he never found a sponsor. He only participated in two individual counseling sessions.

Father's visitation was also inconsistent and troubling. At many visits, father was unable to control the children, or they returned to Ms. R. hungry, injured, or sick.

Because of father's inability to control and supervise his children, coupled with his continued substance abuse, the juvenile court acted well within its discretion in finding that father had not demonstrated a "substantial change" that would warrant delaying the children's need for permanency. (See *In re Heraclio A.* (1996) 42 Cal.App.4th 569, 577; *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.)

Father argues that he provided new evidence to demonstrate changed circumstances, namely a valid physician's statement and recommendation to use marijuana for his pain. However, this was not new evidence. Throughout the pendency of this case, father had a medical marijuana card. He showed the medical marijuana card and physician's statement and recommendation in June 2015. And again in November 2017, father provided the social worker with an updated medical

marijuana card. It follows that the juvenile court correctly found that father had not demonstrated changed circumstances just by providing a new physician's statement and recommendation.

In urging reversal, father asserts that this purportedly new evidence was enough to satisfy the first prong of section 388 because his continued use of marijuana did not affect his ability to care for the children. We disagree. Father repeatedly demonstrated that he was unable to properly supervise and care for his children while he was engaging in sustained use of marijuana.

Moreover, the physician's statement and recommendation upon which father principally relies shows otherwise. That document provides: "The patient further affirms the fact that they have been informed not to drive, operate heavy machinery or engage in any activity that requires alertness while using medical marijuana." As the juvenile court aptly noted, being the sole caregiver for three young, potentially special needs, children is a 24-hour a day job. Father's care required alertness, and his continued abuse of marijuana affected his ability to care for the children.

Because father did not demonstrate changed circumstances, and did not meet the first prong of section 388, the juvenile court did not abuse its discretion in denying father's section 388 petition. Reinstating father's reunification services would just delay permanency, which is in the children's best interest.

**DISPOSITION**

The juvenile court's order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.  
ASHMANN-GERST

We concur:

\_\_\_\_\_, P. J.  
LUI

\_\_\_\_\_, J.  
HOFFSTADT